805A LAW NOTE: SELF-DEFENSE UNDER § 939.48(1m)

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Scope

This Law Note explains the Committee's conclusions about how to implement the provisions of § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.] The provisions of sub. (1m) relate to what is commonly termed the "Castle Doctrine," but caution should be used in relying on that term to accurately describe the new provision. While it is a convenient term, the substance of the "Castle Doctrine" varies state by state; Wisconsin's version is more limited than that of Florida,[1] for example. This Law Note uses the term "the new rule."

The Committee's primary conclusions about the new rule are that it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege, but that it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production. These conclusions are explained in Section II.

The primary focus of the Committee's work on the new rule was on how to implement it procedurally. But there are also issues with respect to its substance. These issues, under the Committee's approach that the new rule goes only to the defendant's burden of production, will not need to be defined for the jury. But they will be important to the judge in deciding whether the defendant meets the burden of production.

I. The Substance of the New Rule in § 939.48(1m).

The key part of the new provision is set forth in sub. (1m) (ar), which reads as follows:

> (ar) If an actor intentionally used force that was intended or likely to cause death or great bodily harm, the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force and shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself if the actor makes such a claim under sub. (1) and either of the following applies:
>
> 1. The person against whom the force was used was in the process of unlawfully and forcibly entering the actor's dwelling, motor vehicle, or place of business, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that an unlawful and forcible entry was occurring.
> 2. The person against whom the force was used was in the actor's dwelling,

> motor vehicle, or place of business after unlawfully and forcibly entering it, the actor was present in the dwelling, motor vehicle, or place of business, and the actor knew or reasonably believed that the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

In the discussion that follows, the requirements set forth in subdiv. 1. and 2. are referred to as the "predicate facts."

The new rule addresses the use of force by a person against someone who has unlawfully and forcibly entered the person's dwelling, motor vehicle, or place of business (or is in the process of doing so). The new rule does not define "unlawfully" or "forcibly." However, § 939.48(6) provides: "In this section, 'unlawful' means either tortious or expressly prohibited by criminal law or both." Thus, the definition in sub. (6) should apply to the new rule. With respect to "forcibly," the standard instructions for robbery use the term "forcibly" to refer to either the use or threat of use of force. See Wis JI-Criminal 1479.

Some of the terms used are defined in the new rule. Section 939.48(1m)(a)1. defines "dwelling": "'Dwelling' has the meaning given in s. 895.07(1)(h)." Section 895.07(1)(h) provides as follows:

> "Dwelling" means any premises or portion of a premises that is used as a home or a place of residence and that part of the lot or site on which the dwelling is situated that is devoted to residential use. "Dwelling" includes other existing structures on the immediate residential premises such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages, and basement.[2]

Section 939.48(1m)(a)2. defines "place of business" as "a business that the actor owns or operates."

The predicate facts that are the basis for the new rule are subject to exceptions set forth in § 939.48(1m)(b). These must be evaluated by the court in determining whether a defendant has met the burden of production on the new rule. The court must find that the exceptions do not apply and that there is some evidence of the predicate facts for the new rule.

Section 939.48(1m)(b) provides:

> (b) The presumption described in par. (ar) does not apply if any of the following applies:

1. The actor was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time.

2. The person against whom the force was used was a public safety worker, as defined in s. 941.375 (1) (b), who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties. This subdivision applies only if at least one of the following applies:

a. The public safety worker identified himself or herself to the actor before the force described in par. (ar) was used by the actor.

b. The actor knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

Section 941.375 (1) (b) defines "public safety worker" as follows:

"Public safety worker" means an emergency medical services practitioner licensed under § 256.15, an emergency medical responder certified under §256.15(8), a peace officer, a fire fighter, or a person operating or staffing an ambulance.

II. The Committee's Conclusions

The Committee has reached the following conclusions about the new rule set forth in § 939.48(1m):

- it does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege;

- it does affect what a defendant must show to have the privilege of self-defense submitted to the jury – that is, it provides another way for the defendant to meet the burden of production;

- when self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change;

- the state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction; and,

- when self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

The Committee realizes that this approach differs from what some may believe to be the impact of the new rule. However, the Committee believes that this approach is the one that is most faithful to the statutory language. The key aspects of the Committee's analysis are described in detail below.

A. The new rule does not change the substance of the existing privilege of self-defense defined in § 939.48 or create an alternative to the existing privilege.

The new rule applies where "the actor makes . . . a claim under sub. (1)," referring to sub. (1) of § 939.48, which is the definition of the privilege of self-defense.[3] Because the new rule plays a role only if "the actor makes . . . a claim under sub. (1)," the new rule is tied to the definition of the existing privilege and does not create an alternative to the existing privilege. The existing privilege under sub. (1), was not changed by Act 94. As applied to the use of deadly force, § 939.48(1) still requires that the actor "reasonably believe that the force used was necessary to prevent imminent death or great bodily harm to himself or herself."

B. The new rule does affect what a defendant must show to have the privilege submitted to the jury – that is, it provides another way for the defendant to meet the burden of production.

The new rule provides that if the actor makes a claim under sub. (1) and the predicate facts apply, "the court . . . shall presume that the actor reasonably believed that the force was necessary to prevent imminent death or great bodily harm to himself or herself." The Committee considered two issues relating to this provision: 1) whether the reference to "the court" refers to the judge alone, or whether it also applies to the jury; and, 2) what the effect is of requiring the court to employ the presumption. The Committee concluded that the reference to "the court" refers to the trial judge, not the jury, and that the effect of the presumption is to assist the defendant in meeting the burden of production that is required to make the privilege of self-defense [as defined in sub. (1) of § 939.48] an issue in the case.

- **"The court" refers to the trial judge, not the jury.**

In most situations, "the court" refers to the circuit court, that is, the judge, not the jury. See, for example, § 967.02(7), which provides [for the purposes of the Criminal Procedure Code]: "Court means the circuit court unless otherwise indicated." The Committee's conclusion that the reference is to the judge only and does not include the jury is consistent with the usual meaning given to "the court" and is faithful to the language of Act 94.

Act 94 had two parts: one relating to civil liability – § 895.62 – and one relating to the criminal law privilege of self-defense – § 939.48(1m). The civil and criminal provisions have roughly the same content, though they are not set up in exactly the same way. Section 895.62(3) is the civil equivalent of § 939.48(1m)(ar) and specifically refers to the "finder of fact":

> . . . the finder of fact may not consider whether the actor had an opportunity to flee or retreat before he or she used force and the actor is presumed to have reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to himself or herself or to another person.

The legislature used the term "finder of fact" in the civil provision, which clearly includes both the judge in a case without a jury and the jury. In the criminal provision that is part of the same act, the legislature used the term "court." Because Act 94 did not use "finder of fact" in the criminal provision, the Committee concluded that the reference to "the court" means the judge and does not include the jury.

- **"The court shall presume" does not affect the state's burden of persuasion.**

The usual effect of a "presumption" is to shift the burden of persuasion from one party to another. This is routinely done in civil cases. In criminal cases, the burden of persuasion is always on the state to prove all facts necessary to constitute the crime[4] and this burden cannot be shifted to the defendant by use of a "presumption."[5] With respect to the privilege of self-defense in Wisconsin, the burden is on the state to prove the privilege does not apply once the defendant meets the burden of production by showing "some evidence" of each aspect of the privilege.[6] The basic problem the Committee confronted is: how do you give defendants the benefit of a presumption as to a specific part of the case when a) they bear no burden of persuasion with respect to establishing that part of the case, and, b) they already enjoy a presumption of innocence as to all aspects of the case?

A defendant has a "presumption of innocence." This means the defendant must be found not guilty unless the state proves beyond a reasonable doubt both that all the facts

necessary to constitute the crime have been established and that any defense raised by the evidence has been disproved. For example, as applied to a first degree intentional homicide case, the state must prove that the defendant caused death with intent to kill [the "elements" of the crime], and, if there is "some evidence" of the privilege of self-defense, that the defendant did not act lawfully in self-defense.[7]

Given the structure of the existing privilege of self-defense, and given that Act 94 did not change that privilege, the Committee concluded that creating a "presumption" about a part of the definition of self-defense [namely, that the defendant reasonably believed deadly force was necessary] does not add anything to what the state is already required to prove. The state already has burden to disprove the privilege of self-defense [once the burden of production is met] and that burden cannot be increased by any presumption the court might employ. Thus, the Committee concluded, Act 94 does not create any new, alternative standard for the jury to consider and there is no reason to communicate the substance of the new rule to the jury.

- **"The court . . . shall presume" provides another way for the defendant to meet the burden of production.**

The Committee concluded that the requirement that "the court shall presume" should be implemented by applying it to the defendant's obligation to meet the burden of production on the privilege of self-defense. The complete privilege of self-defense as defined in § 939.48(1) is to be submitted to the jury when there is "some evidence" of the privilege.[8] In a case that does not involve the new rule, the defendant must point to evidence that he or she reasonably believed the following:

- that there was an actual and imminent unlawful interference with the defendant's person; and,
- that it was necessary to use force or threaten force to prevent or terminate the interference; and,
- when deadly force is used, that it was necessary to prevent imminent death or great bodily harm to himself or herself.

Once there is evidence tending to show these matters, the burden of persuasion is on the state to prove that the defendant's conduct did not meet the standard.[9]

The Committee concluded that under the new rule, the effect of "the court shall presume" is to provide the defendant with another way to meet the burden of production on self-defense. If there is evidence of the predicate facts under § 939.48(1m)(ar)1. or 2., the requirement that "the court shall presume" means that no additional evidence is

required as to the issue of the defendant's reasonable belief that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

Thus, under § 939.48 as amended by 2011 Wisconsin Act 94, there are two ways for a defendant to meet the burden of production on the privilege of self-defense:

- by pointing to some evidence of each part of the definition of self-defense in sub. (1) of § 939.48; or,
- by pointing to some evidence of the predicate facts set forth in sub. (1m)(ar)1. or 2., the provisions created by Act 94.

The determination whether the facts meet the "some evidence" threshold is for the trial court as is the case in other situations involving defenses or mitigating factors.

C. When a defendant asserts the privilege of self-defense under the new rule, the "some evidence" test is applied to the predicate facts.[10]

This section details what is required when a defendant asserts the privilege of self-defense under the new rule set forth in sub. (1m). The trial court should review the evidence, including that produced by the state and by the defendant, to determine whether there is "some evidence" of the predicate facts recognized by the new rule. Specifically, the court must determine whether the evidence, when viewed most favorably to the defendant, shows three things:

1) that the person against whom the force was used

- was in the process of unlawfully and forcibly entering the the defendant's dwelling, motor vehicle, or place of business OR
- was in the the defendant's dwelling, motor vehicle, or place of business after unlawfully and forcibly entering it; AND

2) that the defendant was present in the dwelling , motor vehicle, or place of business; AND

3) that the defendant knew or reasonably believed either that

- an unlawful and forcible entry was occurring OR
- the person had unlawfully and forcibly entered the dwelling, motor vehicle, or place of business.

The court must also determine that the evidence, when viewed most favorably to the defendant, shows that the exceptions to the new rule set forth in sub. (1m)(b) do not apply. Those exceptions are:

- the defendant was engaged in a criminal activity or was using his or her dwelling, motor vehicle, or place of business to further a criminal activity at the time;

- the person against whom the force was used was a public safety worker who entered or attempted to enter the actor's dwelling, motor vehicle, or place of business in the performance of his or her official duties AND the public safety worker identified himself or herself to the defendant before the force was used by the defendant OR the defendant knew or reasonably should have known that the person entering or attempting to enter his or her dwelling, motor vehicle, or place of business was a public safety worker.

If the court finds that there is some evidence that the predicates for the new rule are present, and that the exceptions to the new rule do not apply, the privilege of self-defense should be presented to the jury.

D. When self-defense is presented to the jury in a case where the new rule applies, the substance of the new rule is not presented to the jury and the standard instructions on the privilege of self-defense can be used without change.

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, nothing in the substance of the new rule need be communicated to the jury. The standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change.[11]

E. The state may succeed in proving that the privilege does not apply by proving, beyond a reasonable doubt, that the defendant's conduct does not meet the definition in the standard instruction.

Because the Committee concluded that the new rule does not define a new alternative to the standard for the privilege of self-defense and goes only to the defendant's burden of production, and because the standard instruction on self-defense and the standard homicide instructions that incorporate self-defense can be given to the jury without change, the state can succeed in proving the privilege does not apply by proving that the defendant did not act lawfully in self-defense.[12] The state may do this by proving beyond a reasonable doubt that the defendant did not reasonably believe any of the following:

- that there was an actual and imminent unlawful interference with the defendant's person; or,
- that it was necessary to use force or threaten force to prevent or terminate the interference; or,
- that the force used was necessary to prevent imminent death or great bodily harm to himself or herself.

F. When self-defense is presented to the jury in a case where the new rule applies, the standard instruction on retreat – Wis JI-Criminal 810 – should not be given.

Section 939.48(1m)(ar) also addresses retreat, providing that if the predicate facts apply, "the court may not consider whether the actor had an opportunity to flee or retreat before he or she used force . . ." The standard instruction that addresses retreat is Wis JI-Criminal 810. It provides that while "there is no duty to retreat" evidence relating to retreat may be considered in determining "whether the defendant reasonably believed the amount of force used was necessary to prevent or terminate the [unlawful] interference."

In a case where the new rule may apply, the court must not consider evidence relating to "whether the actor had an opportunity to flee or retreat" in making any decisions the court may be called upon to make regarding the privilege of self-defense. Further, as part of the court's obligation to instruct the jury on the law, the court should, upon request, instruct the jury as follows:

> There is no duty to retreat. You must not consider evidence relating to whether the defendant had an opportunity to flee or retreat in deciding whether the state has proved that the defendant did not act lawfully in self-defense.

COMMENT

Wis JI-Criminal 805A Law Note was originally published in 2013 and revised in 2019. This revision was approved by the Committee in October 2021; it added to the comment.

This Law Note explains the Committee's approach to the expanded privilege of self-defense set forth in § 939.48(1m), created by 2011 Wisconsin Act 94. [Effective date: December 21, 2011; the act first applies to a use of force that occurs on the effective date.].

1. See §§ 776.013 and 776.032, Fla. Stats.

2. In State v. Chew, 2014 WI App 116, 358 Wis.2d 368, 856 N.W.2d 541, the court of appeals affirmed a trial court ruling that the evidence was not sufficient to raise the "Castle Doctrine." The court concluded that a shooting in a parking lot of an apartment complex did not occur in the "dwelling" – a factual predicate for the applicability of the new rule in § 939.48(1m).

3. While the new rule refers to the actor making "a claim under sub. (1)," and while the facts of a case may make it clear that self-defense will be an issue, under Wisconsin law a defendant does not have a general obligation to "claim" a defense in any formal way.

4. The term "facts necessary to constitute the crime" is used to refer to those facts on which the state bears the burden of persuasion. See In Re Winship, 397 U.S. 358, 364 (1970): ". . . the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged . . ." These facts will always include the statutory elements of the crime and will include other facts on which the state bears the burden due to definitions of terms, exceptions recognized by the offense definition, defenses, and some penalty-increasing facts.

5. Mullaney v. Wilbur, 421 U.S. 684 (1974). "Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." Patterson v. New York, 432 U.S. 197, 215 (1977). Also see, Sandstrom v. Montana, 442 U.S. 510 (1979).

6. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

7. A more complete statement of the "some evidence" standard is: when "a reasonable view of the evidence could support a jury finding that the state has not borne its burden of disproving beyond a reasonable doubt the facts constituting the defense." Judicial Council Note to § 940.01, 1987 Senate Bill 191, citing State v. Felton, 110 Wis.2d 485, 508, 329 N.W.2d 161 (1983).

8. Wisconsin law establishes a "low bar" that the defendant must overcome to be entitled to a jury instruction on the privilege of self-defense. State v. Stietz, 2017 WI 58, ¶16, 375 Wis.2d 572, 895 N.W.2d 796 citing State v. Schmidt, 2012 WI App 113, ¶12, 344 Wis. 2d 336, 824 N.W.2d 839. A defendant need only to produce "some evidence" in support of the privilege of self-defense. Stiez, supra, at ¶15. See also, State v. Head, supra, at ¶112. Evidence satisfies the "some evidence" quantum of evidence even if it is "weak, insufficient, inconsistent, or of doubtful credibility" or "slight." State v. Schuman, 226 Wis. 2d 398, 404, 595 N.W.2d 86 (Ct. App. 1999). When applying the "some evidence" standard, a court is not to weigh the testimony, as this would invade that province of the jury. Stiez, supra, at ¶18. Instead, the court should focus on "whether there is 'some evidence' supporting the defendant's self-defense theory." Id. at ¶58. Failure "to instruct on an issue which is raised by the evidence" is error. State v. Weeks, 165 Wis. 2d 200, 208, 477 N.W.2d 642 (Ct. App. 1991).

9. See State v. Head, 2002 WI 99, 255 Wis.2d 194, 648 N.W.2d 413 and Wis JI-Criminal 1014.

10. In State v. Johnson, 2021 WI 61, 397 Wis.2d 633, 961 N.W.2d 18, the Wisconsin Supreme Court concluded that the trial court erred by declining to instruct on self-defense. The Court held that although Johnson unlawfully entered K.M.'s home in the middle of the night, there was some evidence that he had

an objectively reasonable belief that he was preventing an unlawful interference with his person. Although the physical attack in Johnson occurred entirely inside K.M.'s home, the opinion did not interpret, apply, or limit the castle doctrine in any way because the Court was tasked with examining Johnson's, not K.M.'s, actions. Therefore, this decision did not alter the "some evidence" standard used to determine whether a jury should be instructed on self-defense.

11. The free-standing instruction on self-defense involving deadly force is Wis JI-Criminal 805. The instructions for homicide offenses that incorporate instructions on self-defense are Wis JI-Criminal 1014, 1016, and 1017.

12. The standard instructions for intentional homicides involving the privilege of self-defense address both first and second degree intentional homicide and include instructions on the complete privilege and the mitigating circumstance of "unnecessary defensive force." Thus, the approach described above will not be presented to the jury in exactly that form. Absence of the mitigating circumstance is presented as part of the facts necessary to constitute first degree intentional homicide; absence of the complete privilege is presented as part of the facts necessary to constitute second degree intentional homicide. See Wis JI-Criminal 1014, 1016, and 1017.